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IN THE

Supreme Court of the United States

October Term, 1966

No. 616

HAROLD EUGENE WENZLER, JR.,

Petitioner,

vs.

PETER PITCHESS, Sheriff of Los Angeles County, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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PETER PITCHESS, Sheriff of Los Angeles County, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 11, 1966.

Opinions Below.

The opinion of the Court of Appeals [R. 72-73][1] printed in Appendix A hereto, is reported in 359 F. 2d 402. The oral opinion of the District Court (Honorable Leon R. Yankwich) [Tr. 41-47], printed in Appendix B hereto, is unreported. No opinions were rendered in the state courts.

[1]The reference "R" is to the Clerk's Transcript in the District Court and the Clerk's Transcript in the Court of Appeals, numbered consecutively 1-76. The reference "Tr" is to the Reporter's Transcript of the habeas corpus proceedings in the District Court, numbered consecutively 1-48.

Jurisdiction.

The judgment of the Court of Appeals [R. 74], printed in Appendix C hereto, was entered on April 11, 1966. A due and timely Petition for Rehearing was denied on June 8, 1966 [R. 75]. By order of Mr. Justice Douglas dated August 19, 1966, the time to file this Petition for a Writ of Certiorari was extended to and including October 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Whether the petitioner was entitled to relief from restraint by way of federal habeas corpus after due exhaustion of all state remedies where the judgment of conviction under the state obscenity statute was rendered in violation of the provisions of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution in the following respects:

(a) The state obscenity statute was construed as requiring only proof of knowledge of the contents of the film involved without proof of knowledge of the alleged obscenity of the film;

(b) The state obscenity statute was construed as authorizing conviction of petitioner without any evidence in the record to establish that the film involved substantially exceeded contemporary community standards in the depiction of sex or nudity, or appealed to the prurient interest, or was utterly without social importance;

(c) The state obscenity statute was construed as authorizing the alleged obscenity of the film to be measured by the standards of the local community wherein petitioner was prosecuted, instead

of being measured on the basis of a national standard;

(d) The state obscenity statute was construed as authorizing the treatment of the issue of obscenity solely as a question of fact, limiting appellate review in the state courts to such alleged issue of fact, without requiring courts to exercise an independent constitutional judgment;

(e) At the time the judgment of conviction was rendered against petitioner, the state obscenity statute was construed by the lower state courts as authorizing the suppression and punishment for dissemination of material dealing with sex or nudity other than "hard core pornography", whereas subsequently, the California Supreme Court authoritatively held in *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, 31 Cal. Rptr. 800 (1963), that the state obscenity statute provides constitutional protection for all material dealing with sex or nudity, except that described as "hard core pornography".

(f) The film upon which the judgment of conviction rests is neither obscene nor "hard core pornography" and is entitled to constitutional protection, as was subsequently recognized, following the decision in *Zeitlin v. Arnebergh* aforementioned, by the same lower state appellate court which had previously affirmed petitioner's judgment of conviction, when a comparable film far more candid than the film involved herein was held to be constitutionally protected in the light of the decision of the California Supreme Court, all of which was presented in the habeas hearing below.

2. Whether the federal courts below, contrary to law and the Constitution of the United States, erroneously denied petitioner relief by way of federal habeas corpus from the state court judgment of conviction under unconstitutional standards and criteria in the following respects:

(a) Although the state court judgment of conviction was plainly rendered in violation of the United States Constitution, the federal courts below declined to grant petitioner the relief to which petitioner was entitled under the laws and Constitution of the United States;

(b) Without any evidence in support thereof, and despite the fact that no such finding had been made by the state courts, and without remand to the state courts, the federal courts below labeled the film involved herein as "hard core pornography" contrary to law and the Constitution of the United States;

(c) Although the film involved herein is neither obscene nor "hard core pornography" and entitled to constitutional protection, petitioner was denied relief by way of federal habeas corpus, contrary to the provisions of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Constitutional Provisions and Statutes Involved.

The pertinent provisions of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and the provisions of California Penal Code, Sections 311 (Stats. 1961, c. 2147, p. 4427, §5) and 311.2 (Stats. 1961, c. 2146, p. 4428, §5) are printed as Appendix D hereto.

Statement of the Case.

(a) In the Municipal Court of the Pasadena Judicial District in and for the County of Los Angeles, State of California, the petitioner herein was charged with a violation of the state obscenity law, Penal Code §311.2 [R. 3]. After a trial before a judge, without a jury, petitioner was found guilty of violating the state obscenity law by the sale of a film [Ex. 1; Tr. 21, 25] and petitioner was sentenced to thirty days' imprisonment and a fine of $500.00, plus a $25.00 penalty assessment [R. 3].

From the aforesaid judgment of conviction, petitioner prosecuted an appeal to the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California [R. 3]. Said judgment of conviction was affirmed without opinion [R. 4].

Thereafter, a petition for a writ of certiorari was filed in this Court and denied [R. 4], Mr. Justice Douglas being of the opinion that certiorari should be granted (377 U.S. 994). A petition for rehearing was denied (379 U.S. 871). Post-conviction proceedings in the state courts were also unsuccessful [R. 10-12].

(b) On October 30, 1964, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Southern District of California, Central Division [R. 2-13]. The jurisdiction of the District Court was invoked under 28 U.S.C. 2241(a)(c)(3), the petition averring that the petitioner was a person in state custody in violation of the Constitution of the United States. Among other things, the petition alleged that the film which was the basis of petitioner's state court conviction is not obscene and, instead, constitutionally protected expression [R. 4-5]; that the stand-

ards applied by the State in judging the alleged obscenity of the film were constitutionally invalid [R. 4]; that the standards for judging the alleged guilty knowledge and unlawful intent of petitioner were also violative of the provisions of the Constitution [R. 4]; that the judgment of conviction was supported by inadequate proof under relevant constitutional standards [R. 5], and that for the aforesaid reasons, and others contained in the petition, the said judgment of conviction abridged freedoms of speech and press and denied petitioner his liberty without due process of law contrary to the provisions of the First and Fourteenth Amendments to the United States Constitution [R. 4-5].

In support of the aforesaid claims, the Petition alleged as follows: At the time that petitioner's judgment of conviction was affirmed on October 30, 1962 by the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, the state obscenity law, Penal Code §311.2, had been construed as denying appellate courts the power to exercise an independent constitutional judgment as to the alleged obscenity of the charged material [R. 6]. At the time of affirmance, as aforestated, the state obscenity statute was construed as encompassing more than "hard core pornography" as well as material which offended local standards, even if the said material did not offend national standards [R. 6-7]. The said state obscenity statute was construed as punishing any sale of material dealing with sex if such accused merely knew the contents of the material, and regardless of whether the accused knew that the material was obscene [R. 7]. In addition, the state obscenity statute was construed as not requiring the prosecution to prove any essential element of obscenity [R. 9].

The Petition for a Writ of Habeas Corpus further alleged that following the affirmance of the judgment of conviction by the Appellate Department of the Superior Court, as aforestated, the Supreme Court of the State of California, on July 2, 1963, in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, 383 P. 2d 152, 31 Cal. Rptr. 800, authoritatively construed the state obscenity statute, particularly Penal Code §§311 and 311.2, and held that only "hard core pornography" could be constitutionally reached under the state obscenity statute, and that all other material dealing with sex was constitutionally protected [R. 6-7]. Contrary to the prior construction of the law by the lower courts, the Supreme Court of California held that an appellate court had the duty to exercise an independent constitutional judgment on the issue of obscenity and could not treat the question solely as a matter of fact [R. 6].

The Petition further alleged that the judgment of this Court in June 1964, in *Jacobellis v. Ohio,* 378 U.S. 184, included a ruling that the standards for judging obscenity should be measured by national standards and not local community standards [R. 6-7], and that the rulings of the state courts in the prosecution against petitioner relative to the issue of scienter were contrary to the holding of this Court in *Smith v. California,* 361 U.S. 147 [R. 7].

The Petition further alleged that following the ruling in *Zeitlin v. Arnebergh* by the California Supreme Court, the state courts, exercising an independent constitutional judgment, had held material comparable to the film involved in petitioner's prosecution to be constitutionally protected [R. 6-7].

In short, therefore, the Petition for Writ of Habeas Corpus alleged that the judgment of conviction had been obtained under standards and procedures which did violence to the provisions of the First and Fourteenth Amendments to the Constitution, and which the highest court of the State, following the affirmance of the judgment of conviction, had so clearly held. Since the film involved, according to the petitioner, was not obscene and was instead constitutionally protected, and since the judgment of conviction in the state courts had been obtained in plain violation of the Constitution of the United States, petitioner petitioned for the issuance of a Writ by the federal court.

(c) An order to show cause why a writ of habeas corpus should not issue was made on November 2, 1964 [R. 14-15]. The formal return of the respondent Pitchess, with a copy of the judgment of the conviction annexed, was filed on November 5, 1964 [R. 16-20]. The matter came on for hearing before the Honorable Leon R. Yankwich, a Judge of the United States District Court for the Southern District of California, Central Division, on November 10, 1964 [Tr. 1].

Following argument by counsel on the legal and constitutional issues involved [Tr. 4-21], petitioner offered the film involved into evidence [Ex. 1; Tr. 21, 25]. The District Court then viewed the film [Tr. 21].

Petitioner called as a witness on his behalf the Clerk of the aforesaid Appellate Department of the Superior Court in and for the County of Los Angeles [Tr. 22]. The Clerk had brought with him the Reporter's Transcript of the appeal in the state case against petitioner as well as the file of the Appellate Department in the same case [Exs. 2, 3; Tr. 22-23, 25]. The said Clerk

testified that although requested by counsel, the film involved in the state court proceedings had not been sent to this Court at the time the petition for a writ of certiorari was filed in 1964 [Tr. 23].

The said Clerk of the Appellate Department also produced on behalf of petitioner a film which the same Appellate Department had held to be constitutionally protected after the decision of the California Supreme Court in *Zeitlin v. Arnebergh* [Ex. 4; Tr. 23-24, 25]. The decision of the said Appellate Department, holding such film to be constitutionally protected, acknowledged that the court was bound by the decision in *Zeitlin v. Arnebergh*; that the Appellate Department had "made the required independent examination of the evidence" and that the film "was not hard core pornography within the holding of that case" [Tr. 34-35]. The District Court then viewed the comparison film [Tr. 36].

Immediately upon the conclusion of the hearing, the District Court rendered an oral opinion [Tr. 41-47]. The District Judge stated that an appellate court may have a right to determine whether evidence is sufficient or insufficient, but that on habeas corpus "the scope is much more limited" [Tr. 41]. The District Court held that "if there is any evidence in the record upon which a finding could be based to the effect that the film is indecent, then even though upon the basis of the same evidence, we reached a different conclusion—we would not have the right to override the conclusion of the court which is under review" [Tr. 42]. The District Court held further that the film before the court "is of a type where the tribunal could reach one or another conclusion; and the mere fact that

I personally might reach a different conclusion would not be sufficient to have me overturn the finding of the state court on a petition for a writ of habeas corpus" [Tr. 42]. The court declined to return the matter to the Appellate Department for its reconsideration and reexamination of its ruling in the light of the constitutional standards promulgated by the California Supreme Court in *Zeitlin v. Arnebergh* [Tr. 43-46].

Findings of fact and conclusions of law were made by the District Court [R. 22-24]. The court concluded that "in habeas corpus proceedings the jurisdiction to review a lower state court is not the same as an appellate review"; that the state courts "have their own judicial hierarchy and that it is only in exceptional cases that the Federal District Court should intervene and override the decision of one of the state courts"; that after examining the record, reviewing the evidence and hearing the oral argument and making an independent judgment after viewing the film, "the Court finds that this film is one that is proscribed by section 311.2 of the Penal Code of the State of California, that it is indecent, obscene and in fact 'hard-core pornography' and therefore not entitled to constitutional protection" [R. 24].

Petitioner specifically objected to the findings of fact and conclusions of law made by the District Court [R. 27-30]. Petitioner also submitted his own proposed findings of fact and conclusions of law, which were rejected [R. 32-38]. Thereafter, the District Court made its order and judgment discharging the order to show cause, denying the petition for writ of habeas corpus, and remanding the petitioner to the custody of respondent Pitchess [R. 24-26].

On November 30, 1964, the District Court granted a certificate of probable cause, "it appearing that petitioner's appeal to the Court of Appeals for the Ninth Circuit presents a substantial question" [R. 50], and bail pending review was granted in the sum of $500.00 by the said District Court [R. 51-52]. The notice of appeal to the Court of Appeals was filed on November 30, 1964 [R. 56-57].

(d) The opinion of the Court of Appeals (Appx. A) was rendered on April 11, 1966. 359 F. 2d 402. The court implicitly recognized that if the film herein involved could not be termed hard core pornography and therefore constitutionally protected, then the state court judgment "under the California statute as it was construed at the time of his conviction" [R. 73] might be subject to collateral attack in the federal courts. However, the Court of Appeals agreed with the District Court that the film was "hard core pornography" [R. 73], and that for this reason petitioner "has not been deprived of a constitutional right" [R. 73]. A due and timely petition for rehearing was denied on June 8, 1966 [R. 75].

Reasons for Granting the Writ.

1. There can be no dispute on the record herein that the standards and procedures used by the state courts in determining the alleged obscenity of the film herein involved were contrary to law and the provisions of the First and Fourteenth Amendments to the United States Constitution. At the time of petitioner's conviction and affirmance thereof by the Appellate Department, the California Supreme Court in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, 383 P. 2d 152, 31 Cal.

Rptr. 800 (1963), and the decision of this Court in *Jacobellis v. Ohio*, 378 U.S. 184, had not been rendered. The state obscenity statute was construed by the Appellate Department to authorize the judgment of conviction herein under palpably unconstitutional standards and procedures.

In the first place, the petitioner was convicted under a standard which required proof solely of knowledge of the contents of the material without proof that petitioner knew that the film was obscene. As the petition for writ of habeas corpus alleged, the trial judge in the state court stated that there "doesn't have to be knowledge that the material is obscene, only knowledge that he is selling them" [R. 7].[2]

Measured by the requirements of the free speech and press provisions of the Constitution, the aforesaid state standard for judging scienter was palpably invalid. Such an erroneous standard constitutes a substantial restriction on the exercise of freedom of expression and renders an obscenity statute, so construed and applied, unconstitutional, both as a matter of procedural and substantive due process. *Speiser v. Randall*, 357 U.S.

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[2]In *People v. Smith*, Appellate Department of the Superior Court of Los Angeles County, No. CR A-5113 (1962), unreported, the same Appellate Department upheld the ordinance eliminating all requirements of scienter. This Court reversed. *Smith v. California*, 361 U.S. 147. In *People v. Harris*, 192 Cal. App. 2d 887, 13 Cal. Rptr. 642 (1961), the said Appellate Department held that the People were not required to prove that the accused considered the books obscene. "Scienter is knowledge of the contents of the books." 13 Cal. Rptr. at 645. See, *In re Harris*, 56 Cal. 2d 856, 16 Cal. Rptr. 889, 366 P. 2d 305 (1961). Thus, at the time of the affirmance of petitioner's conviction herein, the sole test for judging scienter was "knowledge of the contents". This issue is of course at the present time before this Court in *Austin v. Kentucky*, October Term, 1966, No. 16; and *Redrup v. New York*, October Term, 1966, No. 3.

513; *Smith v. California*, 361 U.S. 147; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 493; *Freedman v. Maryland*, 380 U.S. 51; *Mishkin v. New York*, 383 U.S. 502, 511; *New York Times Co. v. Sullivan*, 376 U.S. 254.

In the second place, the state court judgment of conviction herein was based on a standard and procedure which relieved the prosecution of proving the essential ingredients of the offense. The petition for the writ of habeas corpus stated that the state court had held that the prosecution need not prove, other than by the film itself, that the film went beyond customary limits of candor. The judge in the trial court had stated, as was pointed out in the petition for writ of habeas corpus:

> " 'Well, so there will not be any misunderstanding and so that your record will be protected, I want to state clearly that in my opinion, the matter of contemporary standards with relation to the average man, average person, as used in the section, that is Section 311.2, or the definition section, may be determined by the Court or by the Jury without the admission of any other outside testimony, after having seen the picture or reviewed the book'." [R. 9].

In short, the prosecution in the state court, upheld by the trial judge, made no attempt by evidence to prove that the film involved herein went substantially beyond customary limits of candor in the description or representation of matters pertaining to sex or nudity, or appealed to the prurient interest, or was utterly without social importance. There was thus no attempt made by the prosecution to bear the burden of persuasion to show that this petitioner engaged in "criminal

speech". This was a denial of due process in a fundamental sense and a violation of the protective provisions of the First and Fourteenth Amendments. *Speiser v. Randall,* 357 U.S. 513; *Freedman v. Maryland,* 380 U.S. 51; *Thompson v. City of Louisville,* 362 U.S. 199; *United States v. Klaw,* 350 F. 2d 155 (2 Cir. 1965).

In the third place, the standards for judging the alleged obscenity of the film involved herein were measured by the standards of the local community wherein petitioner was prosecuted. In *Jacobellis v. Ohio,* however, a decision rendered by this Court after petitioner's judgment of conviction had been affirmed, it was held that the validity of a judgment of conviction in an obscenity prosecution could not be measured by the varying standards of local communities but "must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding" (378 U.S. at 195). See also, *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 488.

In the fourth place, at the time of the affirmance of the judgment of conviction by the Appellate Department, a determination of the issue of obscenity was held to be merely the determination of an issue of fact just like any other criminal prosecution. *Cf., Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of Property,* 367 U.S. 717; *A Quantity of Copies of Books v. Kansas,* 378 U.S. 205. The Appellate Department had twice refused to recognize, prior to the decision in *Zeitlin v. Arnebergh* by the California Supreme Court, that the issues of fact in an obscenity prosecution are always entangled in a constitutional claim. See, *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 488. Thus, both in *People v. Smith,* Appellate

Department of the Superior Court of Los Angeles County, No. CR A-5113 (1962), unreported, and in *People v. Harris,* 192 Cal. App. 2d 887, 13 Cal. Rptr. 642 (1961), the Appellate Department had refused to exercise an independent constitutional judgment with respect to the material involved, and the judgment of conviction here was affirmed without such independent judgment being made by the Appellate Department.

In *Zeitlin v. Arnebergh,* however, following the affirmance of the judgment of conviction herein, the California Supreme Court made it clear that such construction of the state obscenity law was palpably unlawful and unconstitutional. The California Supreme Court held "that the reviewing court must make an independent examination of the whole record in cases involving the constitutional issue of free speech" (31 Cal. Rptr. at 805). See also, *Jacobellis v. Ohio,* 378 U.S. 184, 188.

In the fifth place, the state courts never held the film herein to be hard core pornography. At the time of the affirmance of the judgment of conviction, the state obscenity law was construed as justifying the suppression and punishment of a broader segment of material dealing with sex than is covered by the term "hard core pornography". In *Zeitlin v. Arnebergh,* however, the California Supreme Court held that such construction of the state obscenity law was unconstitutional in light of the free speech and press guarantees of the State and Federal Constitutions. The California Supreme Court held that the legislative history of the state obscenity law and the decisions of this Court "impliedly drew a line of constitutional protection around all material except that which has been described as hard core pornography" (31 Cal. Rptr. at 807).

Indeed, it was in the light of *Zeitlin v. Arnebergh* and the proper constitutional construction of the state obscenity law that the same Appellate Department thereafter held that a film, far more candid than the one involved herein, was not hard core pornography and constitutionally protected, the Appellate Department this time deeming itself required in the light of *Zeitlin* to exercise an independent constitutional judgment [Ex. 4; Tr. 23-24, 25, 34-36].

It is thus plain, it is submitted, that in the totality of the circumstances aforestated, the judgment of conviction rendered in the state court was based on standards and procedures violative of the provisions of the First and Fourteenth Amendments, and that the custody of petitioner under such judgment of conviction which violated the provisions of the Constitution necessitated relief in the federal courts under well settled principles. *Fay v. Noia,* 372 U.S. 391; *Townsend v. Sain,* 372 U.S. 293; 28 U.S.C. 2241 (a)(c)(3).

2. The standards employed by the courts below in denying petitioner relief were, it is submitted, contrary to law and the requirements of the Constitution. Initially, it was erroneous for the District Judge to hold that although the court "personally might reach a different conclusion" [Tr. 42] with respect to the alleged obscenity of the film, still that would not be sufficient for the court to overturn the finding of the state court on a petition for a writ of habeas corpus. In essence, the District Court appeared to hold that the determination of what is obscene in the statutory or constitutional sense is no more than a question of fact. However, more than an issue of fact was involved in the determination of the issue of the alleged obscenity

of the film. The real issue was a question of law, to wit, whether the film was entitled to constitutional protection under the Constitution. Clearly a federal district judge may not defer to state court findings and conclusions of law on constitutional issues. *Townsend v. Sain,* 372 U.S. 293, 318; *Daniels v. Allen,* 344 U.S. 443, 507. See also, *Dombrowski v. Pfister,* 380 U.S. 479.

It is settled that a federal district court has broad power in habeas corpus proceedings on behalf of a person unlawfully held in custody pursuant to a state court judgment obtained in violation of the provisions of the Constitution of the United States. Restraints contrary to the Constitution may be challenged on federal habeas corpus, even though imposed pursuant to the conviction of a state court of competent jurisdiction. Federal habeas will lie where state criminal procedures have resulted in violations of the First and Fourteenth Amendments. *Fay v. Noia,* 372 U.S. 391, 430.

Both the District Court and the Court of Appeals below attempted to avoid the issue here by merely holding, without any proof in the record, that the film involved was hard core pornography. Such a ruling was baseless, it is submitted, both in law and in fact. Since the state courts had never themselves held the film to be hard core pornography, it is apparent that the judgment of conviction has been upheld by the courts below on a charge which was neither made nor tried in the state courts. *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196.

Moreover, since comparable material following the decision of the California Supreme Court in *Zeitlin v. Arnebergh* had been held by the same Appellate De-

partment not to be hard core pornography and constitutionally protected, at the very least, petitioner was entitled to a grant of the petition for the writ of habeas corpus, unless the State within a reasonable time afforded the petitioner a new trial and determination in accordance with the governing law and the requirements of the Constitution. See, *Rogers v. Richmond,* 365 U.S. 534, 545-549.

As a matter of procedural due process, the petitioner faces deprivation of his liberty without the slightest proof in the record, either in the state courts or in the habeas corpus proceeding, that the film involved herein is "hard core pornography." A federal question of substantial importance is presented when federal courts on habeas corpus, without evidence in support thereof, place the talismanic label "hard core pornography" upon a film or other media of communication. Such procedures would appear to do violence to the due process, fair trial and free speech and press provisions of the First, Fifth, Sixth and Fourteenth Amendments. *Manual Enterprises, Inc. v. Day,* 370 U.S. 478; *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684; *Freedman v. Maryland,* 380 U.S. 51; *Speiser v. Randall,* 357 U.S. 513; *Tot v. United States,* 319 U.S. 463; *United States v. Klaw,* 350 F. 2d 155.

In addition, as a matter of substantive due process, it is submitted, the film herein involved is not hard core pornography nor indeed obscene. The film involved herein depicts a single nude female variously engaged in moving about in a room and lying on a bed. In going from one room to another, the woman appears to make a "come along" motion to the viewer. The film depicts no intimacies between persons of the same

or opposite sexes, nor episodes of sexual activity of any nature. There is no display of any genital organs.

In view of what is seen daily on television, on the stage, in motion pictures, in magazines, in newspaper advertisements and other media of communication, the film herein obviously does not go beyond the customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex or nudity. The film is well within the portrayal of female nudes that society tolerates. Nudity of course is within a broad area of constitutionally protected expression [*Manual Enterprises, Inc. v. Day,* 370 U.S. 478; *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; *Mounce v. United States,* 355 U.S. 180; *Excellent Publications, Inc. v. United States,* 309 F. 2d 362 (1 Cir. 1962); *Humor Magazine, Inc. v. United States,* 311 F. 2d 576 (1 Cir. 1963)], and films dealing with sex and nudity far more candid than the film herein have been held to be entitled to constitutional protection. *Times Film Corp. v. Chicago,* 355 U.S. 35, reversing 244 F. 2d 439 (7 Cir. 1957); *One, Inc. v. Olesen,* 355 U.S. 371, reversing 241 F. 2d 772 (9 Cir. 1957); *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684; *Jacobellis v. Ohio,* 378 U.S. 184, reversing 173 Ohio St. 22, 179 N.E.2d 777.[3] See also, the concurring opinions of Justice Stewart in *Jacobellis* and *A Quantity of Copies of Books,* 378 U.S. at 197, 214-215; and the dissenting opinion of Justice

[3]See also, *Holmby Productions, Inc. v. Vaughn,* 350 U.S. 870, reversing 177 Kan. 728, 282 P. 2d 412 (1955); *Jos. Burstyn, Inc. v. Wilson,* 343 U.S. 495; *Superior Films, Inc. v. Dept. of Ed.* (*Commercial Pictures Corp. v. Regents*), 346 U.S. 587, reversing 159 Ohio St. 315, 112 N.E. 2d 311 (1953) and 305 N.Y. 336, 113 N.E.2d 502 (1953); *Gelling v. Texas,* 343 U.S. 960.

Stewart in *Ginzburg v. United States,* 383 U.S. 463, 497, 501.

In the light of all of the aforesaid, it is submitted that the film herein involved cannot be deemed obscene nor hard core pornography, but is material which is protected by the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution. The judgment of conviction based upon said film was obtained by the application of unlawful and unconstitutional standards and procedures. Petitioner is in custody under a state court judgment of conviction violative of the Constituion of the United States. Under the laws and Constitution, petitioner was entitled in federal habeas corpus to relief from the aforesaid illegal restraint.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Opinion of the Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Harold Eugene Wenzler, Jr., Appellant, vs. Peter Pitchess, Sheriff of Los Angeles County, et al., Appellees. No. 19,881.

[April 11, 1966]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Jertberg Duniway, Circuit Judges, and Thompson, District Judge.

Duniway, Circuit Judge:

Wenzler was convicted of violating the California obscenity law, Penal Code § 311.2.[1] He was sentenced to 30 days in jail and a fine of $500.00. He appealed, unsuccessfully, and also sought writs of habeas corpus from the California courts, again unsuccessfully. Hav-

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[1] "Every person who knowingly . . . publishes . . . exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

Obscenity is defined in Penal Code Section 311(a):

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

This is obviously based upon the Supreme Court's attempt at a definition of the term in *Roth v. United States,* 1957, 354 U.S. 476.

ing exhausted his state remedies and been taken into custody, he turned to federal habeas corpus. His petition was denied, after a hearing, and he appeals.

The basic facts are not disputed. Wenzler operated a moving picture theatre in Pasadena, featuring "nudie" type moving pictures. At the lobby candy counter, he sold 8 mm. moving pictures for home use. The offense was the sale of such film. *Jacobellis v. Ohio,* 1964, 378 U.S. 184, 187-88, requires that the court in which a first amendment right to publish is asserted must itself read or view the material in question. The district judge saw the film. We have also seen it. He also read the transcript of the trial, in which Wenzler was convicted by a judge, sitting without a jury. We have also read it. The district judge concluded that the film is "hard core pornography," and that Wenzler has not been deprived of a constitutional right.

We agree. *Roth v. United States,* 1957, 354 U.S. 476; *Memoirs v. Massachusetts,* 1966, 383 U.S. 413; *Mishkin v. New York,* 1966, 383 U.S. 502; *Ginzburg v. United States,* 1966, 383 U.S. 463; *cf. Zeitlin v. Arnebergh,* 1963, 59 Cal. 2d 901, 31 Cal. Rptr. 800. If, as we hold what Wenzler sold was hard core pornography, the mere fact (if it be a fact) that others whose product does not fall within that category might have been convicted under the California statute as it was construed at the time of his conviction does not entitle Wenzler to relief in this collateral attack upon his conviction.

Affirmed.

APPENDIX B.

Oral Opinion of the District Court.

"THE COURT: All right. Well, gentlemen, in this type of case, as you know, it is my custom to decide it right from the bench, because the principles governing it have been declared recently.

"We have to bear two things in mind. If this court were sitting as a court of appeal, it would be entirely different from the power the court has in a case of this character. It arises on habeas corpus.

"On an appeal you have a right to determine whether the evidence is sufficient or insufficient, and if the evidence is insufficient there would be a different ruling. But on habeas corpus the scope is much more limited, and especially is this true with habeas corpus in a federal court concerning a decision of a state tribunal.

"The courts hesitate in saying that they will substitute their judgment for the judgment of a duly constituted state tribunal even though they might have reached a different conclusion.

"That is a limitation that applies to habeas corpus. We want to be satisfied that under no circumstance was the judgment not supported. If the situation is such that it is capable of two interpretations, the state court has just as much right to arrive at one as the right to arrive at the other. Otherwise we would have appellate control over a state court, which we do not have.

"The habeas corpus order, as has been said many times, is not an appeal. The question — the entire right to render a judgment, if there is any evidence in the record upon which a finding could be based to the ef-

fect that the film is indecent, then even though upon the basis of the same evidence, we reached a different conclusion — we would not have the right to override the conclusion of the court which is under review.

"I think we will bear this in mind — it is quite evident that the matter before us is of that character — it is of a type where the tribunal could reach one or another conclusion; and the mere fact that I personally might reach a different conclusion would not be sufficient to have me overturn the finding of the state court on a petition for a writ of habeas corpus.

"Now, a petition for a writ of habeas corpus — I am of the view that this film is in that category — that the conclusion which Mr. Fleishman contends for is not commanded by the facts for I say — put it the other way — the facts do not command the only conclusion and that conclusion which Mr. Fleishman would reach.

"The facts lend themselves to the conclusion that the authorities, in declaring this film indecent, were justified, so that I limit my review to that phase, and I must conclude that there are elements in this film upon which a judge might reach the conclusion.

"I realize the broad field that this inquiry is open to. We had a case in Fresno that I heard in which persons from all walks of life, seeing the film, expressed different conclusions; and we left it to the jury's determination that certain films — I think it was United States versus Adahr, was it not?

"MR. FLEISHMAN: Yes, your Honor.

"THE COURT: They reached the conclusion that it was indecent — some disagreed — and after a while the case was allowed to die.

"So that, limiting myself to the scope of review by which I am limited, I am of the view that the conclusion is that this film is an indecent film, and that this is not so devoid of support in the record as to warrant this court interfering with a coordinate state court in finding it is indecent.

"MR. FLEISHMAN: Your Honor, may I suggest something before your Honor says the fatal words?

"THE COURT: Yes.

"MR. FLEISHMAN: In this case, as your Honor observed, the Appellate Department has not had an opportunity to re-examine this in the light of the changing standards that apply to this film.

"May I respectfully suggest to the court that what the court does would be done conditionally, to give the Appellate Department of the Superior Court an opportunity to review the film in the light of the law as it now is and if it was not at the time the decision was rendered.

"In this way the court would not be imposing its will on the State tribunal, and the petitioner would be given the constitutional right that I know he is entitled to, because the Appellate Department never did exercise its independent judgment on the film; that it has a duty to perform; and all that your Honor has said would be more persuasive if, in fact, the Appellate Department had applied the standard that the constitution requires if they had exercised their independent judgment. But as the evidence shows, your Honor, the Appellate Department did not exercise its independent judgment; and did not apply the hard core pornography test to Mr. Wenzler's film; and I would respectfully suggest that a Solomon-like solution to the problem at this time might be to refer the matter back to the Ap-

pellate Department by way of granting the writ conditionally, that the Appellate Department have an opportunity within a reasonable period of time to review the film and if they feel it is obscene within the law as it now exists and since it was now the law at the time that they rendered their opinion.

"Would that not be a fair resolution, your Honor?

"THE COURT: I don't answer questions.

"MR. FLEISHMAN: I withdraw the question.

"May I suggest, most respectfully, that that would be, I believe, a correct position under the law under the law of the United States Supreme Court when the State could has not really answered the question because the Appellate Department has not said that they think the film is obscene.

"All the Appellate Department has said so far was that it was not going to interfere with the trial court's determination.

"Now we know that the constitution required that the Appellate Department indeed say 'yes' or 'no'. They have not done that yet, your Honor. And I think in fairness to the petitioner and in fairness to the constitution and all judicial process that the ends of justice would be best served by giving the Appellate Department an opportunity to say, 'Yes, we think the film is obscene', or 'No, we don't believe it is obscene.'

"That is the right that Mr. Wenzler has not yet had and one that he is entitled to.

"THE COURT: Are you finished?

"MR. FLEISHMAN: Yes, your Honor. You must admit I keep on trying.

"THE COURT: Yes; I know you are very persistent. However, there is a limit to all things.

"However, I think the entire argument is based on a position that has no foundation in law, that under a constitutional question a finding by a state court would be binding on me, or on a federal court.

"There is no such thing. The state court might hold, even interpret the 14th amendment and the similar provision in the state constitution that a certain state of facts exist, and yet when the same question arose before us and we were the final interpreter of the meaning of the federal constitution, we might reach a different conclusion.

"Otherwise we would be in a position where if a state court has assumed to decide the question on the 14th amendment we would be bound by it. That would be just the reverse of the situation. They are bound if we find a judgment is final.

"So that, as I say, my scope here is limited. I have to determine whether there is evidence to sustain the ruling in this particular case of the state court that it is indecent, and I think there is evidence to sustain the ruling in this particular case of the state court. The order to show cause will be discharged and the writ of habeas corpus will be denied.

"Under the rules, as I interpret them, this requires findings. I am going to ask the Government to prepare findings to that effect so that there will be something concrete. Serve them on the other side. They have a right to suggest amendments within five days after you serve them. You do that — prepare findings and the judgment.

"All right. Thank you very much, gentlemen."

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APPENDIX C.

Judgment of the Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

HAROLD EUGENE WENZLER, JR., Appellant, vs. PETER PITCHESS, Sheriff of Los Angeles County, et al., Appellees. No. 19,881.

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 11, 1966.

APPENDIX D.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

3. The pertinent provisions of the Sixth Amendment of the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . ."

4. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

5. California Penal Code, §311 provides:

> "As used in this chapter:
>
> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other prined or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

6. California Penal Code, §311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."